(27)

No. 03-6696

In The Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTRODUCTION

Respondents urge ratification of unchecked and uncheckable executive authority to indefinitely detain citizens seized in a place the Executive decides is a location of armed conflict. According to Respondents, Yaser Esam Hamdi ("Hamdi"), a citizen[1] who has been held indefinitely in solitary confinement in a military prison for over two years, cannot seek judicial review of the factual basis for his imprisonment. Moreover, Respondents claim that Congress has not authorized judicial inquiry or limited the Executive's authority to imprison Hamdi. These arguments urge a radical change in constitutional doctrine and a departure from historical practice.

The Founders were acutely aware of the dangers posed by the accumulation of military power by a single ruler "independent of and superior to the Civil Power." *The Declaration of Independence* para. 14 (1776). Through their design, the Constitution disperses enumerated powers among three branches of government, and ensures that procedural guarantees protect against the arbitrary deprivation of liberties. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 . . . not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."). For this reason, the effectively incommunicado imprisonment of a citizen solely on the authority of the military, with no opportunity for any hearing to test

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[1] Hamdi is indisputably a citizen by birth notwithstanding that he was raised abroad by alien parents. *See Mandoli v. Acheson*, 344 U.S. 133 (1952); *Perkins v. Elg*, 307 U.S. 325 (1939).

the factual basis for the prolonged detention, offends the nation's first and most enduring principles.

This case is not about the power of the Executive to engage in defensive wars or to avert immediate threats to the security of the country. *Cf. The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Rather, this case turns on whether the Executive has the power to detain a citizen without explicit sanction from Congress far from any theater of conflict and more than two years after any exigency has grown stale. What separates the parties is a competing view of the separation of powers – one in which the Judiciary is entrusted to review, and the Legislature is empowered to limit, the detention of citizens by the Executive, and another in which all power over citizens declared by the military to be "enemy combatants" is held exclusively by the Executive branch and is subject to only cursory judicial review. Reversing the decision below will ensure constitutional protection in the handful of cases in which the Executive claims that an American citizen is an "enemy combatant" but chooses not to prosecute for a criminal offense or an offense against the laws of war. An affirmance will unleash a new and far-reaching executive power to imprison citizens indefinitely that cannot be restrained by the other two branches of government.

ARGUMENT

I. DUE PROCESS GUARANTEES THE RIGHT TO BE HEARD

The Fourth Circuit's refusal to permit "any inquiry," J.A. 448, *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003), into the facts underlying Hamdi's detention, or even to allow Hamdi to respond to the allegations advanced to support his confinement, finds no basis in the Constitution. A proceeding in which a party "was never afforded a proper opportunity to respond to the claim against him . . .

has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000). The denial of the opportunity to be heard has no place in a habeas proceeding challenging the lawfulness of a citizen's imprisonment.

Nonetheless, Respondents assert that Hamdi has no right to participate in this proceeding or to challenge the factual basis for his imprisonment because: (1) any additional factual inquiry would violate separation of powers, Resp. Br. 12, 25-27; (2) such inquiry is not required by the Suspension Clause, *id.* at 37-39; and (3) the record sufficiently establishes Hamdi's status as an "enemy combatant" without need for additional factual development, *id.* at 27-36. While Hamdi's case arises in an undeniably sensitive context, his claims raise no new issues under the sun. *Ecclesiastes* 1:9. Only the Fourth Circuit and Respondents' misconstruction of separation of powers doctrine is without precedent.

A. Judicial Review Is Central to the Separation of Powers

Respondents repeatedly claim that "the nature of judicial review . . . is limited by . . . profound separation-of-powers concerns." Resp. Br. 12; *see also id.* at 25-27. But their position and the Fourth Circuit's ruling below are destructive to both the historic function of habeas and the role of the Judiciary as a check on the other branches.

Article III of the Constitution is designed to preserve review by an independent judiciary free of control by the other branches. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). In accordance with this constitutional scheme, courts have not hesitated to review the factual basis for the claim that a citizen is an enemy belligerent. As explained in Hamdi's opening brief, Pet. Br.

26, this Court reviewed a full factual record and rejected the government's claim in *Ex parte Milligan* that the petitioner was a prisoner of war and could be "held, under the authority of the United States, until the war terminate[d]." 71 U.S. (4 Wall.) 2, 21 (1866) (government's argument). Similarly, the district court in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), held a factual hearing to address the same question. Respondents make no claim that these cases "unsettle[d] the constitutional balance." J.A. 442, 316 F.3d at 471. Indeed, Respondents actually concede that courts have authority to determine whether "the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*." Resp. Br. 27. That is precisely what the district court attempted to do in this case.

In a footnote, Respondents distinguish this Court's opinions in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), *Sterling v. Constantin*, 287 U.S. 378 (1932), and prize cases by explaining that they "do not support the type of factual development that petitioners have in mind with respect to the challenged enemy-combatant determination in this case." Resp. Br. 49-50 n.24. But that is not the question. The question is whether a constitutional barrier exists to preclude judicial review of the facts related to military seizures generally, and determinations of enemy combatant status in particular. *Milligan*, *Mitchell*, *Sterling*, and *Territo*, as well as innumerable prize cases, all say that no such barrier exists.

Moreover, the cases cited by Respondents and amici either are expressly limited to aliens,[2] have nothing to do

[2] *Harisiades v. Shaughnessy*, 342 U.S. 580, 581 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 765, 768-69 (1950); *Hirota v. MacArthur*, 338

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with separation of powers,[3] involve a challenge by enemy aliens to an international tribunal and state that citizens should receive judicial review under such circumstances,[4] relate to military personnel or congressional legislation of military affairs,[5] or have nothing to do with review of military seizures of persons.[6] The premise of the Fourth Circuit's opinion, that courts are limited by separation of powers from inquiring into the facts supporting Hamdi's detention, J.A. 449, 316 F.3d at 474, simply has no basis in precedent or separation of powers doctrine.

U.S. 197, 199 (1948) (Douglas, J., concurring); *Ludecke v. Watkins*, 335 U.S. 160, 162-63 (1948).

[3] *Ludecke*, 335 U.S. at 163-64; *In re Yamashita*, 327 U.S. 1, 8 (1946). Amicus American Center for Law and Justice's assertion that the detention of a citizen can be a "political question," and therefore immune from judicial review, Amicus Br. 15 et seq., is contrary to precedent. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942); *In re Yamashita*, 327 U.S. at 9; *cf. Williams v. Rhodes*, 393 U.S. 23, 40 (1968) (Douglas, J., concurring) (noting that "fundamental rights and liberties" have a "well-established claim to inclusion in justiciable, as distinguished from 'political,' questions"). Hamdi's habeas petition does not challenge the wisdom of foreign policy choices, but the lawfulness of government detention – a subject that has always been considered justiciable. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[4] *Hirota*, 338 U.S. at 205, 209 (Douglas, J., concurring).

[5] *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality); *Cox v. United States*, 332 U.S. 442, 448 (1947). In *Burns*, 346 U.S. at 142, a plurality noted that federal courts could review a military serviceman's claims of error arising from a court martial "de novo" through habeas if the military "manifestly refused to consider" those claims, a conclusion supported by the opinion of Justice Frankfurter as well as that of dissenting Justices Douglas and Black.

[6] *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988); *Rostker*, 453 U.S. at 59; *Haig v. Agee*, 453 U.S. 280 (1981); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

B. Refusal to Permit Inquiry Into the Facts Violates the Suspension Clause

Respondents contend that the Suspension Clause ensures no greater review than that afforded Hamdi because under the common law: (1) the government's return could not be controverted; and (2) prisoners of war were not entitled to relief. Respondents are wrong.[7]

First, Respondents ignore the exception under the common law applied in cases of noncriminal executive detention. Pet. Br. 25. In such cases, the general rule against controverting the return did not apply and courts were able to review the factual basis for the detention.[8]

Second, under the common law, individuals could contest by habeas whether they were in fact prisoners of war.[9] This principle has been recognized not only by courts in the United States,[10] but also by authorities cited by Respondents.[11]

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[7] Respondents' assertion that Petitioners have "abandoned" the second claim in the habeas petition, Resp. Br. 6 n.3, is erroneous. Petitioners have consistently maintained that the Fourth Circuit's refusal to permit judicial review of facts violates the Suspension Clause. *See* Pet. Br. 25-26; Pet. Cert. 22-24; J.A. 434 n.5, 316 F.3d at 467 n.5.

[8] *See* Br. of Amici Curiae Former Federal Judges et al., at 19 (collecting cases); Br. of Amici Curiae Law Professors with a Particular Interest in Habeas Corpus Law, *Rumsfeld v. Padilla*, No. 03-1027, at 12-15.

[9] *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779); *R. v. Schiever*, 97 Eng. Rep. 551, 552 (K.B. 1759); *see also* Br. of Amici Curiae Legal Historians, *Rasul v. Bush*, Nos. 03-334, 03-343, at 20-22; Br. of Amici Curiae Commonwealth Lawyers Ass'n, *Rasul v. Bush*, Nos. 03-334, 03-343, at 26-28.

[10] *In re Fagan*, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4,604) ("The writ of habeas corpus had long been in frequent use, in a great variety of cases . . . [including those by] persons detained under military authority as soldiers or prisoners of war."); *In re McDonald*, 16 F. Cas.

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C. The Factual Record Cannot Support Hamdi's Detention

Respondents maintain that the one-sided factual record consisting solely of the Mobbs declaration – which is all that the district court was allowed to consider, J.A. 352-53 – is sufficient to establish that Hamdi is an "enemy combatant." Resp. Br. 27-34. Respondents are wrong.

1. For starters, Respondents rely upon facts outside the Mobbs declaration: the location of Hamdi's capture, *compare* Resp. Br. 1, 6, 10, 18, 33-34, 48 *with* J.A. 149 ¶ 4; the standards and criteria supposedly used in the military's screening process, *compare* Resp. Br. 3-4 *with* J.A. 149 ¶¶ 5-8; representations about Hamdi's intelligence value, Resp. Br. 42; and irrelevant information about al Qaeda, Resp. Br. 47 n.23.[12] This resort to facts that go beyond what the district court was permitted to review implicitly concedes that the Mobbs declaration is insufficient to support Respondents' claims.

In addition, Respondents and the court of appeals rely upon an alleged concession as to the location of Hamdi's capture, Resp. Br. 29-33; J.A. 443, 316 F.3d at 471, that

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17, 79 (E.D. Mo. 1861) (No. 8,751) (holding that Missouri militiaman seized by Union forces was entitled to seek relief by means of habeas corpus).

[11] *See* R.J. Sharpe, *The Law of Habeas Corpus* 113 (1976) (noting that if "it appears that he may have been improperly detained as a prisoner of war . . . the court will investigate the propriety of the detention"); *The King v. Superintendent of Vine Street Police Station, ex parte Liebmann*, 1 K.B. 268, 274 (1916) ("I will consider in the first place whether Liebmann is an alien enemy.").

[12] Respondents have never alleged any relation between Hamdi and al Qaeda.

was not conceded in fact,[13] and could not be conceded in law because Hamdi was not permitted to meet with counsel at any relevant time during the litigation.[14] Respondents argue that prisoners of war have no general right to counsel under international law, and no right to "automatic" or "immediate" access to counsel at all. Resp. Br. 39-42. But these arguments both mischaracterize Hamdi's claims and reason in a circle that because Hamdi is an enemy combatant, he has no right to confer with counsel to contest that he is an enemy combatant.[15]

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[13] *See, e.g.*, Pet. Cert. 5 (noting that Hamdi *resided* in Afghanistan in Fall 2001); J.A. 500-03, *Hamdi v. Rumsfeld*, 337 F.3d 335, 360-62 (4th Cir. 2003) (Luttig, J., dissenting from denial of reh'g en banc) (explaining that identification of *residence* is not the same as conceding the place of *seizure*).

[14] *See Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890) ("[A] next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him."); *see also White v. Miller*, 158 U.S. 128, 146 (1895).

[15] Under the Due Process Clause, Hamdi is entitled to access to counsel appointed by the district court pursuant to 18 U.S.C. § 3006A(a)(2)(B) at a time that allows meaningful participation in the proceedings. Respondents incorrectly allege that this argument was not "pressed" below. Resp. Br. 45. Hamdi raised his due process claim to access to appointed counsel when Respondents challenged the district court's order permitting access. *See* Reply Cert. 9-11. The claim was therefore preserved for review upon the issuance of a final order. *See United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950).

Respondents correctly observe that what process is due depends on the circumstances – but fail to acknowledge that the Constitution demands more process in the case of an indefinite detention than one that is relatively brief. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (noting that in case of long-term detention, "the length of the imprisonment would raise a different question"). Respondents' assertion that incommunicado detention is necessary to gather intelligence was not

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Most importantly, the Executive has no authority to unilaterally select the evidence upon which a habeas proceeding is decided,[16] or to obtain summary dismissal in the face of a material factual dispute.[17] Given Respondents' concession that courts faced with a habeas petition by an alleged "enemy combatant" must decide whether "the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*," Resp. Br. 27, a material dispute exists, at the very least, about whether Hamdi is an "enemy combatant." Hamdi should have been allowed to adduce evidence and challenge the facts submitted by Respondents on that issue.

2. Unwilling to rely upon the Fourth Circuit's separation of powers rationale which requires no evaluation of evidence, J.A. 449, 316 F.3d at 474, Respondents invoke the "some evidence" concept which has no place in this proceeding. "Some evidence," as Respondents concede, is not a standard of proof but a standard of review. Resp. Br. 35. It applies only when there has been some previous adjudicative process.[18] Here, there is none. Further, application of the "some evidence" standard would be incompatible with the principle that courts cannot defer to

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addressed by the Fourth Circuit below, J.A. 431 n.4, 316 F.3d at 466 n.4, and raises grave and novel constitutional issues that this Court should not address in a case in which the Department of Defense has conceded that access to counsel would not interfere with intelligence gathering needs. *See* Resp. Br. 8-9.

[16] *See Harris v. Nelson*, 394 U.S. 286, 298 (1969); *Walker v. Johnston*, 312 U.S. 275, 287 (1941); *cf. Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) (rejecting immigration commission's deportation determination because the immigration official simply excluded from the factual record evidence and testimony favorable to the petitioner).

[17] *Walker*, 312 U.S. at 286-87.

[18] *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 San Diego L. Rev. 631, 663-64 (1988).

factual findings that arise from a proceeding that is fundamentally unfair. *See Kwock Jan Fat*, 253 U.S. at 464. Application of the "some evidence" standard here also would mark the first time that this Court has required less than "clear and convincing" evidence to authorize a substantial deprivation of a citizen's liberty. *See Addington v. Texas*, 441 U.S. 418, 432-33 (1979).[19]

3. Lastly, even the one-sided facts in the record do not support the lawfulness of Hamdi's detention. They establish that Hamdi resided in Afghanistan during the fall of 2001, but that fact alone is indecisive because constrained residence in enemy territory does not imply "enemy" character even for purposes of prize law.[20] Moreover, in conclusory language, Hamdi is alleged only to have been "affiliated" with a Taliban unit. J.A. 148 ¶ 3.

[19] Because Hamdi is being held in solitary confinement in a prison, moreover, only criminal process would be sufficient to authorize his present detention. Pet. Br. 20-21. Respondents maintain that Hamdi is being held solely for non-punitive purposes, Resp. Br. 16 n.5, even though confinement in a prison has long been held to be unnecessary and inappropriate to detain prisoners of war. *See* William E.S. Flory, *Prisoners of War* 41 (1942). Indeed, as far back as 1785, the United States entered into a treaty prohibiting confinement of prisoners of war "in convict prisons and the use of irons." L. Oppenheim, *International Law* § 125 (H. Lauterpacht ed., 7th ed. 1952). Whether or not international law and military regulations permit such treatment here, Hamdi's solitary confinement in a prison – without daylight and in irons – violates substantive due process. *Cf. United States v. Salerno*, 481 U.S. 739, 747 (1987).

[20] *Cf. The Peterhoff*, 72 U.S. (5 Wall.) 28, 60 (1867) (enemy status based on residence rule "has never held in respect to persons faithful to the Union. Such citizens . . . lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country."); *Guessefeldt v. McGrath*, 342 U.S. 308, 320 (1952) (finding that forty-two year German resident of Hawaii involuntarily detained in Germany during World War II was not an "enemy" for purposes of the Trading with the Enemy Act).

The sole reference in the Mobbs declaration suggesting that Hamdi was a "combatant" states that, before September 11, 2001, Hamdi agreed to fight only "if necessary." J.A. 149 ¶ 5. Neither reference explains the extent of Hamdi's "affiliation," or suggests that Hamdi ever fought for the Taliban, or even that he agreed to fight after hostilities began with the United States. If "affiliation" is the operative question for purposes of determining "enemy combatant" status,[21] therefore, the Mobbs declaration supplies no information to permit the Court to assess the use of that term here. *Cf. Rowoldt v. Perfetto*, 355 U.S. 115, 120-21 (1957) (holding that record based on petitioner's confession of affiliation was "too insubstantial to support the order of deportation" predicated upon "membership" in Communist party).

Hamdi is entitled to a meaningful habeas corpus proceeding. Unless he is permitted to respond to the allegations against him with the assistance of appointed counsel, the habeas proceeding is incompatible with rudimentary principles of due process.

II. CONGRESS CAN LIMIT THE EXECUTIVE'S AUTHORITY TO DETAIN ENEMY BELLIGERENTS

Congress "expressly vested plenary power in the federal courts" to investigate and weigh facts related to the legality of detention through habeas proceedings. *Wingo v. Wedding*, 418 U.S. 461, 468 (1974); *see also Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941). Nevertheless, the Fourth Circuit concluded that adhering to 28

[21] The term "enemy combatant" is not a recognized status under international law or United States military regulations. Br. of Amicus Curiae Global Rights at 6-11.

U.S.C. §§ 2243, 2246, and 2248 in this case would run afoul of the separation of powers. J.A. 440-41, 316 F.3d at 470. Likewise, Respondents urge this Court not to construe another statute, 18 U.S.C. § 4001(a), in such a way that it would "conflict" with the Executive's authority as Commander in Chief to detain enemy combatants. Resp. Br. 22. The premise of these arguments – that Congress cannot limit the exclusive power of the Executive to detain enemy belligerents – is indefensible.

1. No "singular textual constitutional commitment of power" to the Executive to detain prisoners of war exists. *See* Resp. Br. 14 n.4. As an initial matter, Respondents inaccurately assert that the Constitution assigns the Commander in Chief, "in particular," the power to "provide for the common defense." Resp. Br. 13. That power, in fact, is vested in the Congress by virtue of section 8, clause 1, of Article I. Similarly, Respondents seek to appropriate Congress' war power by quoting *Stewart v. Kahn*, 78 U.S. 493 (1870), out of context. Resp. Br. 19. *Stewart* involved a challenge to a wartime statute and therefore speaks of *congressional* war power when it states that "[i]t carries with it inherently the power to guard against the immediate renewal of the conflict." 78 U.S. at 507.

Stewart illustrates that the Constitution devotes far more text to describe the war powers of the Congress than those of the Executive. "Indeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). The President, by contrast, is designated by the Constitution as the Commander in Chief of the armed forces, art. II, § 2, and is authorized to appoint and

commission officers, art. II, § 3, cl. 5.[22] The Constitution's emphasis on congressional, rather than executive, war power has permitted this Court to state almost without exaggeration that "[t]he whole powers of war [are], by the constitution of the United States, vested in congress." *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *see also Miller v. United States*, 78 U.S. 268, 305 (1870). The constitutional division of war powers between Congress and the Executive stands firmly against Respondents' claim to unrestrained executive authority to detain enemy belligerents.

2. Respondents also contend that the Executive's authority with respect to the detention of prisoners of war is "deeply rooted in this Nation's history." Resp. Br. 14. This too is inaccurate. During the Revolutionary War, the Continental Congress delegated authority with respect to prisoners of war to General Washington. Consequently, "General Washington, as commander in chief, received the authority to select the Commissary General of Prisoners." George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, at 8 (1955).

Congressional authority with respect to prisoners of war continued after ratification of the Constitution. In the

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[22] Respondents materially misquote *Eisentrager* to assert that the Commander in Chief power " 'of course' " includes " 'all that is necessary and proper for carrying [it] into execution.' " Resp. Br. 13 (quoting *Eisentrager*, 339 U.S. at 788). In fact, after describing the Constitution's grant of war power to *both* Congress and the Executive, this Court stated: "And, of course, grant of war power includes all that is necessary and proper for carrying *these* powers into execution." *Eisentrager*, 339 U.S. at 788; *cf. Ex parte Quirin*, 317 U.S. at 26 (enumerating congressional war powers, including power to enact necessary and proper legislation); *Stewart*, 78 U.S. at 506 ("Congress is authorized to make all laws necessary and proper to carry into effect the granted [war] powers.").

late eighteenth and early nineteenth centuries, the Congress regularly passed statutes that authorized the detention of prisoners of war. For example, Congress enacted statutes authorizing the detention[23] and exchange[24] of sailors during the undeclared war with France. As noted in Petitioner's opening brief, Pet. Br. 42, Congress also authorized the Executive to detain prisoners of war during the declared War of 1812.[25] And, Congress passed a statute regulating the capture of prisoners found on ships seized as prize.[26] These enactments establish that Congress plainly possesses authority by virtue of the Captures Clause, art. I, § 8, cl. 11, and surrounding language to enact legislation relating to the detention of prisoners of war.

3. Respondents' reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), do nothing to support a claim of exclusive executive authority with respect to the detention of prisoners of war. Resp. Br. 13-15. Indeed, *Quirin* and *Eisentrager* speak of the war powers held collectively by the Legislature and the Executive.[27]

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[23] *An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States*, 1 Stat. 574-75, § 4 (1798).

[24] *An Act concerning French Citizens that have been, or may be captured and brought into the United States*, 1 Stat. 624 (1799).

[25] *An Act for the safe keeping and accommodation of prisoners of war*, 2 Stat. 777 (1812).

[26] *An Act concerning Letters of Marque, Prizes, and Prize Goods*, 2 Stat. 759, § 7 (1812).

[27] As for *Duncan*, Respondents materially abbreviate the Court's dictum that the case did not involve the "well-established" authority of the military over members of the armed forces, or "enemy belligerents, prisoners of war, *or others charged with violating the laws of war*." 327

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4. Respondents also contend that the Executive's power over prisoners of war is established by the law of war. Resp. Br. 14. But Respondents fail to confront the argument that the law of war invests no authority in the Executive branch and does not speak to the constitutional division of powers between Congress and the Executive. *See* Pet. Br. 39 (citing *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)). And even the authorities cited by Respondents do not support the claim that citizens may be held as prisoners of war. *See* Oppenheim, *supra* note 19, § 86 ("[T]raitorous subjects of a belligerent who . . . fight in the armed forces of the enemy" "may be, and always are, treated as criminals.").

In sum, neither constitutional text nor legal history nor precedent nor international law establish that the authority to detain enemy belligerents is held exclusively by the Executive. Congressional legislation that affects the detention of alleged "enemy combatants," such as the habeas corpus statutes or 18 U.S.C. § 4001(a), therefore cannot violate the separation of powers.

III. ONLY CONGRESS POSSESSES THE AUTHORITY TO PERMIT THE LONG-TERM DETENTION OF CITIZENS

1. Respondents do not take issue as a general matter with the argument that the structure of the Constitution opposes the aggregation of unchecked authority by any branch. Instead, Respondents make four arguments to

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U.S. at 313-14 (citing *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946)) (emphasis added). *Cf.* Resp. Br. 14-15. Given the *Duncan* Court's citations and the language omitted by Respondents, the Court's language refers to individuals charged with violating the laws of war.

support the Executive's authority to detain Hamdi: (1) the power to detain citizens is incident to the Executive's power to engage in defensive war, Resp. Br. 19; (2) citizens are treated no differently than other belligerents, *id.* at 17 (citing *Ex parte Quirin*, 317 U.S. 1 (1942)); (3) the Executive has historically detained citizens as prisoners of war, *id.* at 15; and (4) 18 U.S.C. § 4001(a) does not apply, *id.* at 21. These arguments are unpersuasive.

First, the Executive's responsibility to respond to an attack on this country without waiting for legislation is predicated on the existence of circumstances that cannot wait for legislative action. *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Such circumstances have nothing to do with the detention of a citizen for over two years in the United States far from any area of conflict and long after any possible exigency related to the citizen has expired.

Second, Respondents fail to address the argument that the exercise of military jurisdiction over the citizen in *Quirin* was explicitly authorized by Congress. Pet. Br. 36-38. If the Executive possessed authority to try a citizen by military tribunal simply by virtue of status as an "enemy combatant," this Court in *Quirin* need not have pointed to Congress' explicit authorization for the tribunal. Moreover, Respondents' argument that the authority to detain is necessarily subsumed within the authority to try a citizen by military tribunal ignores the difference between judicial process and none at all. As Alexander Hamilton stated long ago, it is "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten," not trial by military tribunal with access to counsel, that "is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." *The Federalist* No. 84 (Alexander Hamilton) (internal quotation and citation omitted).

Third, the historical record does not support unilateral executive authority to detain citizens as prisoners of war. In *Ex parte Milligan*, this Court firmly rejected the Executive's claim that it could detain Milligan, a citizen and resident of Indiana, although the government contended that he was a prisoner of war. 71 U.S. (4 Wall.) 2, 131 (1866). Lower courts faced with military detentions of citizens during the War of 1812 likewise rejected claims of executive power over citizens. *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

These cases cannot be distinguished as involving mere "*civilians*" as opposed to "*enemy combatants*." Resp. Br. 18 n.6. As this Court stated in *Quirin*, "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy . . . [is a] familiar example[ ] of [a] belligerent." 317 U.S. at 31. In *Smith*, the court rejected the detention of a citizen seized where U.S. forces were stationed and detained "under martial law, as a spy," because "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." 12 Johns. at 265, 266. Chancellor Kent in *Stacy* similarly rejected military jurisdiction over a citizen accused of "giving information to the enemy." 10 Johns. at 330 (reporter's notes). In both cases, the citizens detained by the military fell squarely within *Quirin*'s description of a belligerent. The distinction between *Quirin* and these cases is the existence of congressional authorization.[28]

[28] The detention of Confederate soldiers during the Civil War does not stand as an example of executive authority to detain citizens. Resp.

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Fourth, Respondents fail to establish the inapplicability of 18 U.S.C. § 4001(a). The plain language is patently clear, and therefore does not warrant resort to the legislative history to determine its meaning. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). The argument that the statute, passed at the height of the Vietnam War, does not mean what it says because it was enacted to repeal the Emergency Detention Act ("EDA") of 1950 makes little sense. The EDA's repeal was effected by the legislation that repealed it, not the statutory language of section 4001(a) that was passed alongside. Likewise, the canons of construction suggest that use of *dissimilar* language in other parts of section 4001 should not be read into subsection (a). *Cf. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998).

2. Respondents' principal argument in support of congressional authorization of Hamdi's detention is that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), includes the power to detain prisoners as a "quintessential and necessary

Br. 15. Congress both authorized the suppression of the rebellion, and suspended the writ of habeas corpus with respect to persons held as prisoners of war. *See An Act to provide for the suppression of rebellion*, 12 Stat. 281 (1861); *An Act relating to habeas corpus*, 12 Stat. 755 (1863). Because the Civil War necessarily involved citizens, congressional authorization for the use of force to suppress the insurrection was clearly directed at the citizens in rebellion. And if the Executive enjoyed inherent authority to detain citizens as prisoners of war, suspension of the writ with respect to such prisoners would have been unnecessary.

During World War II, the Ninth Circuit held that principles drawn from international law authorized the detention of a citizen who, unlike Hamdi, had received a full evidentiary hearing on whether he was in fact a prisoner of war. *In re Territo*, 156 F.2d 142 (9th Cir. 1946). But international law does not give the Executive any power that is not otherwise conferred on it by the Constitution or Congress.

aspect of the *use* of military force." Resp. Br. 20. This "blank check" theory has no basis in historical practice or precedent.

Respondents disregard the narrow construction of declarations of war by this Court in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814), and *Caldwell v. Parker*, 252 U.S. 376, 385 (1920). Nor do this Court's opinions addressing civil liberties in wartime give comfort to Respondents that a declaration of war constitutes sufficiently clear congressional authorization for the confinement of citizens. *See Ex parte Endo*, 323 U.S. 283, 300 (1944); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).[29] Even *Ex parte Quirin* suggests that a declaration of war does not by itself authorize detention. *See* 317 U.S. at 28-29. The Court there strongly emphasized the existence of congressional authorization, even though, as it stated, the trial of enemies who violate the laws of war is "incident to the conduct of war." *Id.* at 28.

The Fourth Circuit's opinion wrongly suggests that this case presents a choice between observing procedural niceties and granting the Executive the power to wage war effectively. Fortunately, the choice is far simpler. If the detention of citizens suspected of being "affiliated" with enemies is important to the conduct of war, Congress unquestionably could enact legislation, with sufficient constitutional safeguards, that would permit the Executive to detain such citizens in the interests of national security. Section 412 of the USA PATRIOT Act, 8 U.S.C.

[29] The detention challenged in *Endo* was by order of General De Witt, even if administered by a civilian agency. 323 U.S. at 289, 298. The civilian nature of the administering agency is a distinction that makes no difference. And *Endo*, like Hamdi's case, does not involve a challenge to a military tribunal. *Id.* at 297-98.

§ 1226a, and the now repealed Emergency Detention Act show that Congress knows how to authorize detention based on national security when it wants to. But Congress has not done so here. This Court should not grant unprecedented power to the Executive, and impose a limitation on the ability of Article III courts to give life to the Great Writ, simply because Congress has yet to permit the indefinite detention of citizens on the Executive's say-so.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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